MOTION FILED
FEB 6 1987

No. 108, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

STATE OF NEBRASKA, Plaintiff

v.

STATE OF WYOMING, Defendant

MOTION OF AMICUS CURIAE NATIONAL AUDUBON SOCIETY FOR LEAVE TO FILE A BRIEF IN SUPPORT OF NEBRASKA'S MOTION FOR LEAVE TO FILE AN AMENDED PETITION

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The National Audubon Society ("Audubon") moves for leave to file a brief in support of Nebraska's Motion for Leave to File an Amended Petition for Apportionment of Non-Irrigation Season Flows and Assertion of New Claims. Audubon submitted to the court its Brief in Support of Nebraska's Motion on November 11, 1991. In support of this motion, Audubon states the following:

1. Audubon has participated in this proceeding

before Special Master Owen Olpin as litigating amicus curiae since 1988. As an amicus, Special Master Olpin defined Audubon's role as to "ensure the ultimate protection of [environmental] interests . . . and, as traditional friends of the court, to aid in full exposition of the issues." Seventh Memorandum of Special Master at 7 (April 1, 1988). Since the Special Master ruled that Audubon could participate, Audubon has done so during all stages of the case by filing briefs and participating in oral argument at the hearings. Currently pending before the Special Master and this Court is Audubon's Petition for Reconsideration of Motion for Leave to Intervene to become a full party to the proceeding, which Audubon filed on August 2, 1991 in response to the Special Master's invitation to do so. Hearing June 7-8, 1991, transcript pp. 292-293.

2. Audubon and its members have a vital interest in the outcome of the proceeding. Audubon is a national, non-profit conservation organization dedicated to the preservation of birds and other wildlife and their habitat. Audubon has over 550,000 members, more than 3,000 of whom reside in Nebraska. Audubon staff and members are involved in numerous activities related to the Platte, including: (1) management of a 1,200-acre sanctuary on the river near Gibbon, Nebraska for the

benefit of the river's wildlife; (2) participation in the Platte River Management Joint Study with the U.S. Fish and Wildlife Service and the Bureau of Reclamation; and (3) participation in this proceeding before the Special Master as amicus curiae, and several federal and state administrative proceedings to represent its members' interest in the river's wildlife.

3. The Platte River and its tributaries comprise one of the most important migratory bird habitats in North America. The river provides habitat to approximately 250 species of migratory birds, including the endangered Whooping Crane, Bald Eagle, Piping Plover, and Least Tern. Several segments of the so-called "Big Bend" reach of the Platte from Lexington to Denman, Nebraska have been declared "critical habitat" for the Whooping Crane by the U.S. Fish and Wildlife Service. 43 Fed. Reg. 20,938 (1978); 50 C.F.R. § 17.95 (1991). The value of the river as habitat for the species is dependent on the maintenance of minimum instream flows.

4. The court's decision in this case will affect the rights of the parties to the natural flow of the Platte. As a result, the court's decision will control the degree to which flow is available downstream in Nebraska. Audubon and the other parties to this proceeding are involved in separate administrative proceedings in

Nebraska to allocate the river's flow in the state among competing uses, including wildlife.

5. Granting Audubon leave to file a brief would contribute to the Court's analysis of the issues in Nebraska's Motion for Leave to File an Amended Petition by bringing relevant information to the Court's attention that has not been covered adequately by the parties in their briefs. In particular, Audubon's brief would describe the value of the Platte River ecosystem to the migratory birds that depend on it, and the effect that further diminumtion of flows, during the irrigation or non-irrigation seasons, would have on the species.

6. Audubon submitted its Brief in Support of Nebraska's motion on November 11, 1991. Audubon did not file an accompanying motion for leave to file the brief at that time, because it did not appear from the Supreme Court rules that such a motion was necessary. Rule 17 requires that a motion for leave to file preface the initial pleading in any original action. Sup. Ct. R. 17.3. Audubon's brief in support of Nebraska's Motion for Leave to Amend was not an initial pleading. Rule 37 specifies several situations in which a motion for leave to file a brief amicus curiae is necessary that are inapplicable in this proceeding. For example, Rule 37 requires a motion for leave to file a brief amicus curiae in connection with a petition for a writ of certiorari, or

in a case before the Court for oral argument. Sup. Ct. R. 37. In this case, Audubon has played a unique role for an amicus, which was defined by the Special Master, by participating along with the parties in all aspects of the proceeding.

Though it appeared unnecessary, two of the four amici who filed briefs in response to Nebraska's motion included with their briefs motions for leave to file. The Court granted those motions on January 21, 1992. Audubon files this motion for leave to file the brief it previously submitted in the event that the court deems such a motion necessary.

Respectfully submitted,

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